

After reviewing the evidentiary record, hearing arguments and considering the briefs of the parties, the Appeals Board finds as follows:

The Administrative Law Judge awarded claimant a 9 percent permanent partial general disability based on functional impairment that resulted from work-related bilateral thumb injuries. The Award was a whole body disability as provided in K.S.A. 1991 Supp. 44-510e instead of a scheduled injury as provided for in K.S.A. 1991 Supp. 44-510d because injuries were sustained to both hands. See Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986). No appeal was taken from claimant's disability award. As noted above, the only issue that is before the Appeals Board was the failure of the Administrative Law Judge to assess all or a portion of the Award against the Fund.

Prior to examining the Fund liability issue, the Appeals Board finds that it is necessary to recite some of the relevant facts of the case. The Award involved two separate docket numbers with two separate alleged dates of accident. Docket No. 170,595 was filed for a date of accident of December 20, 1988. Docket No. 170,596 was filed with a date of accident of September 1991. Claimant injured her right thumb on December 20, 1988 while lifting a patient at work. Thereafter, while protecting her right thumb injury claimant started having symptoms in her left thumb in September 1991. Claimant was treated for both thumb conditions by John B. Moore, IV, M.D., a plastic reconstructive hand surgeon located in Olathe, Kansas. Dr. Moore diagnosed claimant with a ligament injury to her right thumb and arthritis condition in the joints of both thumbs aggravated by claimant's work activities. Dr. Moore treated claimant conservatively with splints and injections. Dr. Moore restricted claimant to only use of her left hand at work until he returned her to full duty on April 17, 1989. The last time the claimant was seen by Dr. Moore for treatment for her bilateral thumb injuries was September 29, 1992. At the time of the regular hearing on July 12, 1994, claimant remained employed by respondent as a licensed practical nurse.

At the request of claimant's attorney, Nathan Shechter, M.D., an orthopedic surgeon, examined and evaluated claimant on August 17, 1993. Dr. Shechter's diagnosis was general arthritis in both the carpal trapezium joints on the right and left, which had been aggravated by claimant's continuous use. Dr. Shechter opined that claimant sustained a 7 percent whole body functional impairment as a result of her right thumb injury. In reference to claimant's left thumb injury, Dr. Shechter opined a 2 percent whole body functional impairment. Dr. Shechter combined these functional impairment ratings for a 9 percent whole body functional impairment as a result of claimant's bilateral thumb injuries. Dr. Shechter placed permanent restrictions on claimant to refrain from excessive use of both thumbs. He also recommended that she wear splints and take anti-inflammatory medication.

Dr. Shechter was extensively interrogated in reference to questions concerning Fund liability. Dr. Shechter opined that the causal factor for claimant's right thumb injury was the December 20, 1988 accident. However, Dr. Shechter also concluded that claimant's continuing work activities after the December 1988 accident permanently aggravated claimant's right thumb condition resulting in additional permanent functional impairment. Dr. Shechter was not able to place a quantitative figure on the amount of functional impairment claimant had sustained as a result of the December 1988 accident. Dr. Shechter testified that the reason claimant's left thumb became symptomatic was overuse due to compensating for her right thumb injury. Furthermore, Dr. Shechter opined that after both thumbs became symptomatic, claimant alternated performing her work activities with either thumb which caused both thumbs to gradually worsen.

An employer may shift liability to the Fund for all or a portion of the compensation awarded, if the employer employed or retained an employee with knowledge of a preexisting impairment which would constitute a handicap in obtaining or retaining employment. The Fund would then be liable if the injury or disability would not have occurred "but for" the preexisting impairment or was contributed to by the preexisting impairment. See K.S.A. 1991 Supp. 44-567. The respondent has the burden of proving that it knowingly retained a handicapped employee. See Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, Syl. ¶ 1, 609 P.2d 687, rev. denied 228 Kan. 807 (1980). Thus, for the respondent to shift a portion or all of its liability to the Fund in this case it has to establish that the claimant became handicapped after the first accident that caused injury to her right thumb. Thereafter, respondent then has to establish it retained the claimant, despite the knowledge of the handicap, and that the subsequent injury or disability would not have occurred "but for" or was contributed to by the preexisting impairment.

After claimant's first right thumb injury, respondent filed a Form 88, Notice of Handicap, Disability or Physical Impairment, with the Division of Workers Compensation. This notice created a presumption that the respondent had knowledge of claimant's preexisting right thumb condition. See K.S.A. 1991 Supp. 44-567(c). The Appeals Board finds that the Form 88, claimant's testimony, Dr. Moore's records and Dr. Shechter's testimony, established that the respondent retained the claimant after the December 20, 1988 accident with knowledge that claimant was a handicapped employee.

The Administrative Law Judge found the Fund was not liable for all or any portion of the Award. The Administrative Law Judge reasoned that claimant's left thumb injury was a separate injury and since there was no evidence of preexisting impairment, the Fund could not be held liable for the left thumb injury. The Appeals Board disagrees and finds that the preexisting impairment is not required to be the same nature as the subsequent injury. The only requirement is that the subsequent injury or impairment would not have occurred "but for" the primary preexisting impairment or that the preexisting impairment contributed to the injury for which compensation was awarded. See Grizzle v. Gott Corp., 19 Kan. App. 2d 392, Syl. ¶ 3, 872 P.2d 303 (1993). In Grizzle, the court affirmed the lower court's assessment of 100 percent liability to the Fund. The court held that a physician's testimony established that a claimant's preexisting right wrist problem not only brought about claimant's shoulder injury but also caused the injury to develop into a permanent general body disability. *Id.* at 398. In the instant case, the Appeals Board finds that the testimony of the claimant coupled with the opinions of Dr. Shechter establish that claimant received a permanent injury to her left thumb because of overcompensating for her preexisting right thumb injury.

The Administrative Law Judge also found that the Fund was not liable for the resulting right thumb disability because there was no evidence in the record to apportion disability between the claimant's original right thumb injury on December 20, 1988 and subsequent aggravation. The Appeals Board also disagrees with the analysis of the Administrative Law Judge in reference to claimant's resulting right thumb disability. The Appeals Board finds that the claimant's testimony and Dr. Shechter's testimony established that after claimant returned to work from her initial right thumb injury, her work activities aggravated her preexisting right thumb condition making it worse. The work activity that caused claimant the most problems was dispensing of medication. Claimant was required to push pills out of plastic bubbles on a repetitive basis. Although Dr. Shechter could not place a specific amount of disability that occurred to claimant's right thumb as a result of the December 20, 1988 accident, he did opine that claimant had some disability at that

time. Dr. Shechter opined that after claimant's left thumb became symptomatic because of overuse, the alternating working with her left hand and her right hand caused further injury and disability to both thumbs. Accordingly, the Appeals Board finds, based on the whole evidentiary record, the respondent has presented persuasive evidence that has established it retained claimant as a handicapped employee and claimant's resulting disability would not have occurred "but for" her preexisting permanent physical impairment.

However, the Appeals Board finds that the Fund is not liable for the 14.57 weeks of temporary total disability awarded in this case. The record established that these temporary total disability benefits were paid as a result of the December 20, 1988 accident to claimant's right thumb. Since there is no evidence in the record that indicates claimant had any preexisting problems with the right thumb, the Fund is not responsible for this accident. See Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, Syl. ¶ 3, 698 P.2d 392 (1985).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 13, 1994 is hereby modified as the Award relates to the liability of the Workers Compensation Fund.

The Workers Compensation Fund is hereby ordered to pay 100% of the Award entered in this matter, except for the award of 14.57 weeks of temporary total weekly disability benefits at the rate of \$263.00 per week for a total of \$3,831.91.

All other orders of the Administrative Law Judge contained in his Award that are not inconsistent with this Order are incorporated herein and made a part of the Appeals Board Order.

Costs of transcripts in the record are taxed against the Workers Compensation Fund as follows:

Hostetler & Associates, Inc.	\$372.06
Richard Kupper & Associates	\$239.75
Metropolitan Court Reporters, Inc.	\$187.00

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John M. Duma, Kansas City, KS
 Eric T. Lanham, Kansas City, KS
 Charles D. Vincent, Paola, KS
 Robert H. Foerschler, Administrative Law Judge
 Philip S. Harness, Director